Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 211

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D. SMALLWOOD, et al., etc.,

Petitioners,

—vs.—

JUAN G. GALLARDO, Treasurer of Porto Rico.

No. [redacted] 212

ADOLFO VALDES ORDONEZ, SALVADOR GARCIA, VICTOR OCHOA, et al., etc.,

Petitioners,

—vs.—

JUAN G. GALLARDO, Treasurer of Porto Rico.

No. [redacted] 213

INSULAR MOTOR CORPORATION,

Petitioner,

—vs.—

JUAN G. GALLARDO, Treasurer of Porto Rico.

PETITION FOR WRITS OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

FRANCIS G. CAFFEY,
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New York City.

The Alpert Press, 130 Lexington St., Bklyn, N. Y. Tel. 7 Triangle 1058-1059

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No.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petitioners, who are the complainants in the above entitled causes, respectfully show as follows:

1. These cases involve an important Federal question which has been decided below in a way

probably in conflict with the applicable decisions of this Court.

2. There are three reasons why the matter is important:

(a) The issue is whether legislation of Porto Rico violates an act of Congress prescribing freedom from duty of merchandise going into Porto Rico from continental United States.

(b) The determination of that issue here would govern numerous other cases. Some already considered below, wherein certiorari is not asked, are held there upon orders staying mandates and extending the time for seeking rehearings pending the outcome of the present application; some not yet decided are held to await this result.

(c) Porto Rico between 1919 and 1925 enacted a series of statutes designed to raise a large share of its revenue from the taxation of merchandise going there from continental United States. The one passed in 1919, as amended in 1921, was held by its own Supreme Court to infringe the law of the United States establishing free trade in such merchandise. Several attempts have been made to overcome or evade the obstacle. The statutes now criticised are instances of efforts of this type. It is of grave concern to the government of Porto Rico, as well as to all its taxpayers, to have a specific ruling on the subject from the Court of last resort.

3. Petitioners import automobiles into Porto Rico. These go exclusively direct by steamer from

continental United States. On arrival the ocean carrier delivers them in original packages to petitioners, who are also dealers and regularly engaged in selling them in Porto Rico.

4. In 1923 the legislature of Porto Rico laid an *ad valorem* tax of 10% and in 1925 of 7% on automobiles. In the words immediately defining the incidence of the tax the articles subjected to it are described in the 1923 statute as those "produced, manufactured, sold or used in Porto Rico" and in the 1925 statute as those "sold, transferred, used or consumed in Porto Rico." Each statute, however, also contains substantive clauses, the result of which is that, by the terms of both statutes, no automobile (with a few exceptions which do not affect these cases) is permitted to enter Porto Rico from the United States without the importer incurring liability for the tax thereon the instant he acquires possession of it from the carrier who has transported it to Porto Rico.

5. The Organic Act of Porto Rico provides that merchandise shall go into Porto Rico from the United States free of duty and that in no event shall duties be collected thereon.

6. Petitioners brought bills in the United States District Court for Porto Rico to enjoin the respondent from collecting from them this *ad valorem* tax on automobiles they imported from the United States and from seizing their property for non-payment of the tax. They alleged that the statutes imposing the tax contravene the free trade clause of the Organic Act. The District Court denied relief. Its final decrees were affirmed by the Circuit Court of Appeals for the First Circuit.

7. The court below based its action wholly upon the view that the automobiles concerned, while still in the hands of the importers and in the original packages in which carried from continental United States to Porto Rico, were immediately taxable when they came to rest in Porto Rico in the same way that original packages transported in interstate commerce are taxable by the State of arrival as soon as they come to rest there. In its opinion (R. 151), reported under the title of *Porto Rico Tax Appeals*, 16 Fed. (2d) 545, 549, it was said:

> "The taxes on sales of goods taken into Porto Rico from the United States must be held valid under Somebern vs. Cureton, 262 U. S. 506, and West India Oil Co. vs. Gallardo, supra. While commerce between the United States and Porto Rico is not, technically, interstate commerce, the right of Porto Rico to tax the sales of goods arriving therein from the United States is not less than the right of a state to tax the sales of goods arriving therein in interstate commerce. Brown vs. Maryland, 12 Wheat. 419, is not applicable to importations (so called) from the United States."

8. In so holding the lower court went contrary to *Brown vs. Maryland* and misapplied *Somebern Bros. vs. Cureton*.

> (a) The denial by the Constitution to a State of power to tax an import from a foreign country is essentially identical with the prohibition by Congress against Porto Rico laying duties on goods going there from continental United States. While the subjects

to which applicable differ; while the source of the limitation on a State is the Constitution and of the limitation on Porto Rico is a statute, the process that is exempted is the same. In consequence the steps or elements comprehended in the process are the same. *Brown* vs. *Maryland* held that the constitutional immunity of an import from taxation by a State extends to a sale or opportunity for sale by the importer in the place to which imported of the merchandise in the original package in which the same was contained during transportation to the port of entry. This immunity necessarily includes the stage of delivery to the importer by the importing carrier. Yet, by the statutes sustained below, liability for the tax which Porto Rico imposes on automobiles becomes fixed upon the importer, and is measured by the import value, at the moment the articles imported reach him notwithstanding they are then in the same form and condition in which brought into the island.

(b) In *Somebora Bros.* vs. *Curtiss* it was determined that when merchandise carried through interstate commerce comes to rest within a State it is taxable by that State in the original package. The court below construed that case as establishing the time when exemption of an importation from taxation comes to an end. Yet the sole question in the *Somebora* case was whether the State tax dealt with regulated or burdened commerce between the States, and this Court there expressly said that where immunity from taxation of imports exists it continues throughout the period during which the imported article

is in its original package and until the importer sells or has opportunity to sell it in that form.

9. There is presented herewith as part of this petition a certified transcript of the records of the above entitled causes in the Circuit Court of Appeals.

WHEREFORE, petitioners pray that writs of certiorari severally be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding that court to certify and send to this Court, on a day certain to be therein designated, full and complete transcripts of the records and all proceedings in said Circuit Court of Appeals in these causes, to the end that said causes may be reviewed and determined by this Court as provided by law, and that the decrees of said Circuit Court of Appeals in these causes may be reversed by this Court, and that petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate.

And petitioners will ever pray.

FRANCIS G. CAFFEY,
Solicitor for Petitioners.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

FRANCIS G. CAFFEY, being duly sworn, says:

I am solicitor for the petitioners herein. I have read the foregoing petition and know its contents. The same is true to the best of my knowledge, information and belief.

FRANCIS G. CAFFEY.

Sworn to before me this
23rd day of March, 1927.

DAVID D. VINCENT,
Notary Public, N. Y. Co. 33, Reg. 7001,
Cert. filed Kings Co. 1, Reg. 7000,
Commission expires March 30, 1927.

(Seal)

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to favorable consideration of the Court, and that it is not filed for the purpose of delay.

FRANCIS G. CAFFEY,
Counsel.

BRIEF.

For convenience extracts from the Porto Rico tax statutes of 1923 and 1925 and from the Organic Act of Porto Rico are set out in annexed appendices. An additional appendix contains translation of extract from an opinion by the Supreme Court of Porto Rico which is reported only in Spanish.

This petition and another to be submitted at the same time cover six cases. These were selected by counsel as sufficient to test and be determinative of the issues in forty-three cases decided together below (R. 129-131) and in numerous other cases pending there undecided.

Jurisdiction.

(1) Review by this Court is sought pursuant to section 240 (a) of the Judicial Code. This is done within the three months period prescribed by section 8 (a) of the Act of February 13, 1925 (43 Stat. at L. 940, c. 229), after entry in each case on January 7, 1927, by the Circuit Court of Appeals of the decree of affirmance (R. 154).

(2) The District Court had jurisdiction under section 24 (1) of the Judicial Code, made applicable by section 41 of the Jones Act (39 Stat. at L. 965, c. 145), because (a) the cases arise under a law of the United States (R. 10, par. 7; 123, par. 9, subdiv. 2; 67, par. 7; 689, par. 9, subdiv. 2; 81, par. 6; 82, par. 8, subdiv. 2); (b) the matter in controversy in each case exceeds, exclusive of interest and costs, the sum or value of $3,000 (R. 3, par. 2; 30, 33, 36; 60, par. 2; 77, par. 2; 113, 120); (c) there was no adequate remedy at law and suit in equity lies for an injunction (R. 10,

par. 6; 12, par. 9, subdiv. 4; 67, par. 6; 69, par. 9, subdiv. 4; 80-1, 82-3, 138-148, 150-1).

(3) The decrees of the District Court were final (R. 57-9, 71-3, 107-8) and the United States Circuit Court of Appeals for the First Circuit was authorized to entertain appeals therefrom (Judicial Code, secs. 116, 128).

STATEMENT.

As will appear later, petitioners maintain that the criticised statutes are invalid on their face. For the disposition of that contention perhaps no addition is needed to what has been said in the petition about the facts. Nevertheless, it is pertinent to call attention to several things:

(a) No automobiles are produced or manufactured in Porto Rico. Petitioners deal in those articles. All they handle are imported by themselves directly from continental United States into Porto Rico, where they are regularly engaged in selling them in the same condition in which they leave the United States and arrive in Porto Rico, without any process of further manufacture or improvement. These transactions in automobiles constitute all or the principal part of their business. The continuance of the business depends on their ability successfully to import and sell the automobiles.

(b) In the *Smallwood* and *Ordonez* cases the tax in controversy is that prescribed on automobiles by the 1923 statute and in the *Insular Motor* case that prescribed by the 1925 statute.

(c) The bills are in the usual form to enjoin the collection of taxes. Among other things, each alleges the foregoing facts (R. 2-13, 59-70, 76-84).

In the *Smallwood* and *Insular Motor* cases answers were filed (R. 22-7, 84-7) and in the *Ordonez* case a motion made to dismiss the bill because of failure to state a cause of action (R. 71). In the *Smallwood* and *Insular Motor* cases evidence was taken (R. 29-52, 111-120), which establishes without dispute the averments relied on in this petition.

(d) The position of respondent is made clear by the answers in the *Smallwood* and *Insular Motor* cases. He there asserts that the tax assailed is not on importations, but is on sales of imported articles after they have acquired a situs in Porto Rico and have become a part of the mass of property of the sellers therein (R. 25, par. 7; 26, par. 9-c; 26-7, special defense; 86, special defense).

(e) In the *Smallwood* and *Insular Motor* cases the testimony shows that the cars subjected to taxation were transported to Porto Rico packed in boxes (R. 29, 115) and that after landing they remained in those boxes in the hands of the carriers until removal by the importers from the docks (R. 29, 30, 115-6).

(f) In the *Ordonez* case the motion to dismiss (R. 71) concedes the allegation of paragraph 2 of the bill that the automobiles are sold by the importers "to the public at large in exactly the same conditions in which they are brought into Porto Rico" (R. 60).

(g) Actual assessments are predicated upon manifests and other writings produced by the importer for examination by respondent's agents (R. 40-1, 112, 119) and, at least in some instances, are made not merely before delivery of the merchandise by the carrier to the importer and before the packages in which it was transported to Porto

Rico are broken and before any sale by the importer has occurred, but even preceding arrival of the goods in Porto Rico (R. 41, 113).

(h) The method by which respondent fixes the amount for which he assesses the tax is illustrated by documents in the *Insular Motor* case (R. 124-8). The base he uses is composed of the purchase price in the United States (R. 127), the inland freight in and the cost of boxing for shipment from the United States (p. 128), the transportation expenses from the United States to Porto Rico (R. 126) and 10% of the total of those items (R. 125). Upon this base the tax is calculated at the rate prescribed by the statute (R. 125). The oral testimony in the *Smallwood* and *Insular Motor* cases is indisputably to the same effect (R. 44-5, 112, 119-0).

(i) In all the cases the prayer, among other things, is for an injunction against the collection of the tax on the articles involved, whether in the original packages in which brought from the United States or after delivery by the carrier in the original packages or otherwise (R. 12, 69, 83).

Preliminary Points.

(1) As no motor vehicles are produced or manufactured in Porto Rico, any tax on them applies only to such as are imported.

(2) The *ad valorem* tax on automobiles originated in Act No. 55 of July 15, 1919 (Laws of 1919, p. 226). The rate was doubled and minor changes were made by Act No. 42 of July 1, 1921 (Laws of 1921, p. 298). In both statutes there were expressly included as subjects of taxation motor vehicles "introduced or brought into Porto

Rico." In *Benitez Sugar Co. vs. Aboy*, 34 P. R. Rep. 36 (Appendix D), it was held that the Act of 1921 imposed duties on goods going into Porto Rico from continental United States in violation of the free trade clause of the Organic Act (Appendix C).

(3) A comparison, by means of parallel columns, of the Act of 1919 or 1921 with the Acts of 1923 and 1925 would reveal an obvious purpose to continue in the latter statutes the taxation of merchandise coming from the United States which the Supreme Court of Porto Rico condemned in the case just cited, the alterations in regard to such merchandise being solely in the form of phraseology and not in substance. At this stage, however, it would be unduly burdensome to go into the details necessary to demonstrate the truth of that statement.

(4) The persistent effort by Porto Rico to lay duties on imports from the United States has culminated in a unique confession embodied in the Act of 1925. By section 109 of that statute (Appendix B) a direct duty at the same rate prescribed by section 16, payable "at the time of the importation," is laid on the articles embraced in section 16 (including automobiles) when "imported into Porto Rico from any state, territory or district of the United States," to become effective when Congress approves and, if Congress approves, entirely to supersede the tax imposed by section 16. (See note to Appendix C.)

(5) Taxation exists only by legislative action. It can come into being solely through exercise by the legislature itself of the sovereign's function. In consequence whether a tax is levied must be de-

termined by examination of a statute (*Meriwether vs. Garrett*, 102 U. S. 475, 515).

(6) The meaning of a statute is to be ascertained from its effect (*Henderson vs. Mayor*, 92 U. S. 259) or "self-evident operation" (*Miller vs. Milwaukee*, 47 Sup. Ct. Rep. 280; 71 L. ed. 346).

(7) Each petitioner is a "dealer" within the definition of that term in section 17 of the Act of 1923 (Appendix A) and section 12 of the Act of 1925 (Appendix B).

Propositions.

(1) The tax is levied on the automobiles while still in the form and original packages in which they reach Porto Rico.

(2) The tax is on importations from continental United States into Porto Rico and not on sales in Porto Rico after completion of entry there.

(3) The option of a dealer to defer actual payment of the tax until he sells the articles does not affect or relieve of the liability therefor which was incurred contemporaneously with their coming into his possession.

(4) The Organic Act prohibits taxation by Porto Rico of merchandise in the form and original packages in which it arrives there from the United States.

(5) The rule that a State may tax goods transported in interstate commerce as soon as they come to rest within its borders does not apply here.

ARGUMENT.

I.

The tax is levied on the automobiles while still in the form and original packages in which they reach Porto Rico.

Analysis of the Act of 1923 will make clear that coincidentally with the delivery to the Porto Rican importer of merchandise brought into the island from the United States his liability for the tax thereon accrues. The articles made the subject of the tax, carried into Porto Rico, cannot reach the possession of the importer there without his liability for the tax immediately attaching, irrespective of whether previously there has been or thereafter shall be a sale.

Section 33 (Appendix A) provides in part that the prescribed tax on the articles (including automobiles)

> " * * * shall be levied *as soon as* they are on the market *in the possession of a dealer* * * * in this island, *who shall be responsible for the payment of said taxes* upon transferring said articles to another dealer or consumer, or *upon* acquiring them or *having them in his possession*."

It will be noted that the tax is levied "as soon as" the articles "are on the market in possession of" the person to whom delivery is made, and that he becomes "responsible for" its payment upon "having them in his possession." True a dealer is responsible, in the alternative, upon "transferring" or "acquiring" the articles; but as he is also liable instantly when he takes possession, it is inescapable that the tax accrues concurrently with

the inception of his possession. This is rendered the more certain by another provision (sec. 7-a) which defines "acquire," as used in the statute, to mean "material possession of the taxable article in Porto Rico *to be* exposed for sale, use or consumption." Inasmuch as petitioners import the articles exclusively for purposes of sale, within the statute such articles are *acquired* as soon as received; i. e., *eo instanti* upon delivery by the ocean carrier which has transported them from the United States. Moreover, as a dealer who himself is an importer cannot conduct his business without taking possession of the imported merchandise, there is no way by which he can avoid the tax on it.

In the same way, though in different language, the Act of 1925 (Appendix B) levies the tax immediately upon the goods reaching the possession of the importer. Section 11 provides that "every taxable article hereunder in possession of" a dealer "shall be affected hereby." This can mean nothing except that the tax liability is absolute the moment the goods get into the possession of the importer.

Obviously if the tax liability becomes fixed upon delivery of an importation by the ocean carrier to the Porto Rican importer, the automobiles when taxed are in the form and original packages in which brought into Porto Rico.

It may be suggested that the employment in section 33 of the 1923 statute of the expression "on the market" delays the accrual of the tax until the importer has removed the import to his own premises and there exposed it for sale. The answers are that (a) this interpretation is inconsistent with other parts of the section and (b), as will be seen later, additional provisions yet to be discussed compel its rejection.

II.

The tax is on importations from continental United States into Porto Rico and not on sales in Porto Rico after completion of entry there.

As previously observed, the words of the Acts of 1919 and 1921 "introduced or brought into Porto Rico," as a portion of the adjective description of the articles subjected to taxation, were omitted from the Acts of 1923 and 1925. The question is whether a substitute of the same significance was incorporated.

Unfortunately the formulation of an adequate answer is tedious. The statutes are lengthy. They must be traced through in order to discover their real meaning.

In the clauses of the later statutes providing rates on motor vehicles the phrases used are in the Act of 1923 (sec. 20, subdiv. 18) "produced, manufactured, sold or used in Porto Rico" and in the Act of 1925 (sec. 16, subdiv. 15) "sold, transferred, used or consumed in Porto Rico." It may be conceded that if the matter turned *solely* on these particular words, it would not necessarily follow that importations are taxed. When, however, resort is had to other clauses, it is manifest that a duty is laid on all importations from continental United States.

That it was the purpose of Porto Rico to deprive the articles of free entry into the island is evident, in part, from the following:

(a) The tax is exacted *once only* (Act of 1923, sec. 20, subdiv. 18; Act of 1925, sec. 16, subdiv. 15). If the object had been to tax sales, then every sale, whenever occurring, would have been put on an equal basis and there would have been no reason to limit to a single time.

(b) The valuation for taxation is 110% of the cost in continental United States, plus freight and other expenses of carriage to and delivery in Porto Rico (Act of 1923, sec. 6; Act of 1925, sec. 4). The moment required for ascertaining value of an article taxed is when it reaches the possession of the importer. If the intent had been to tax sales, then plainly the valuation at which taxed would have been the price at which sold. Yet, the price at which sold is without any significance whatsoever—except only that in event a sale be *later* made for less than the valuation at which taxed, the Treasurer may entertain application for a refund of the deficiency below 10% included under the name of profit in calculating that valuation.

(c) If a dealer does not pay the tax at the time he acquires possession, he must give bond to pay it (Act of 1923, sec. 53; Act of 1925, sec. 23). This requirement completely negatives the concept that it is sales that are taxed. (See III, *infra*.)

(d) Goods on hand at the date of the statute going into effect are exempt from the tax (Act of 1923, sec. 35, proviso b; Act of 1925, sec. 35, proviso at end). This points unerringly to the conclusion that the tax is on the importation and not on the sale. If the design had been to tax sales, then obviously a sale of accumulated stock held by a merchant in Porto Rico when the new law went into force would have been subjected to the tax.

(e) Destroyed merchandise (Act of 1923, sec. 41) is relieved from the tax of 1923. If the tax were on sales, there would have been no occasion for this provision.

Numerous other parts of the statutes, the recital of which now would be burdensome, fortify

our interpretation. When, however, the summary just made is considered in conjunction with the fact that liability for the tax is complete whenever articles embraced in the statutes reach a dealer, it would seem incontrovertible that, so far as concerns automobiles carried from the United States, it is the importations rather than the sales that are taxed.

III.

The option of a dealer to defer actual payment of the tax until he sells the articles does not affect or relieve of the liability incurred concurrently with their coming into his possession.

There is an alternative to postpone payment of the tax until a sale is made (Act of 1923, sec. 33; Act of 1925, secs. 37 40). It will doubtless be urged that this shows that the tax is on the sale. That, however, does not follow. The condition on which delay may be availed of prevents. A dealer who has taken possession without paying at the time he got possession is compelled to give bond in accordance with regulations of the Treasurer (Act of 1923, sec. 33; Act of 1925, sec. 23). In *Henderson vs. Mayor*, 92 U. S. 259, a shipowner conveying persons to New York from a foreign country had the choice of paying $1.50 for each or furnishing a bond. It was said (p. 274) that the direction "to give the bond or pay the money because he has landed the passenger" was the levy of a head tax. It is equally true that the demand by Porto Rico that a dealer who has taken possession at the dock of merchandise brought from the outside pay a tax or give a bond is the levy of a tax on the import.

IV.

The Organic Act prohibits taxation by Porto Rico of merchandise in the form and original packages in which it arrives there from the United States.

The language of the statute establishing free trade between Porto Rico and the United States, as embodied in the U. S. Code (Appendix C), is in part as follows:

> "All merchandise and articles * * * coming into Porto Rico from the United States shall be entered at the several ports of entry free of duty and in no event shall any duties be collected on said merchandise or articles."

The Constitution (Art. I, sec. 10, clause 2) provides that

> "No State shall, without the consent of the Congress, lay any imposts or duties on imports * * *."

The immunity granted by the Constitution from taxation by a State of an import from a foreign country is no less than the immunity granted by the Organic Act from taxation by Porto Rico of merchandise going from continental United States to Porto Rico. The process of goods going into Porto Rico from the United States is identical with the process of goods coming into the United States from a foreign country. It follows that the elements of which entry into Porto Rico of goods from continental United States consists are the same as the elements of which entry of goods into the United States from abroad consists.

It follows also that whatever constituent of that entry has been freed by the Constitution from taxation by a State has likewise been freed by the Organic Act from taxation by Porto Rico so far as concerns articles going there from continental United States.

In *Brown vs. Maryland*, and the long line of decisions of this Court for more than a hundred years reaffirming the doctrine there announced, it is settled that free importation includes freedom from taxation of sales in original packages by the importer after the articles have reached his hands. If a State is prohibited from requiring of an importer a license fee to make sales in original packages of goods brought into a State from a foreign country, then likewise Porto Rico is prohibited from collecting what it denominates an internal revenue or excise tax on a sale in original packages, after importation, of goods imported from continental United States. As the greater includes the less, so also if the articles are exempt until subsequent to sale or opportunity to sell in that form, the importation itself, which of necessity is a preceding step, is exempt. The ruling below to the contrary is in flat opposition to *Brown vs. Maryland*, where it was said (12 Wheat. 439):

> "it is plain, that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port."

V.

The rule that a State may tax goods transported in interstate commerce as soon as they come to rest within its borders does not apply here.

In saying that the immunity was at an end when the articles came to rest in Porto Rico (R. 151, par. 11; *Porto Rico Tax Appeals*, 16 Fed. (2d) 549) the Court of Appeals was not warranted in relying on, but flew in the face of, *Sonneborn Bros. vs Curreton*. It was there sought to get this Court to take that very position. To the argument in support of it this was the reply (262 U. S. 509-0):

> "The reasoning is based on the supposed analogy of the immunity from state taxation of imports from foreign countries which lasts until the article imported has been sold, or has been taken from its original packages of importation and added to the mass of merchandise of the State. This immunity of imports was established by this Court in *Brown vs. Maryland*. • • •
>
> "The holding was that the sale was part of the importation. It is the article itself to which the immunity attaches and whether it is in transit or at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the State may not tax it. • • •
>
> "Cases subsequent to *Brown vs. Maryland* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from state taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an

> article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce."

The automobiles taxed by Porto Rico were at rest there. The tax accrued at the very time they passed into the hands of the importer. This is the effect and "self-evident operation" of the statutes. The articles were then still "in the form and package in which imported." The privilege granted by the laws of the United States would be illusory if it were not interpreted to embrace the stage of delivery of the articles in original packages by the ocean carrier to the Porto Rican importer. The *Sonneborn* case holds unequivocally that the immunity of an import from taxation continues, by virtue of its import status, long subsequent to its reaching a point of rest by the carrier turning it over to the importer.

Conclusion.

It is respectfully submitted that the writs should be granted, the causes reviewed and the decrees of the Court of Appeals reversed as prayed in the petition.

Dated, March 23, 1927.

FRANCIS G. CAFFEY,
Solicitor for Petitioners.

APPENDIX A

Extracts from Porto Rican tax statute of 1923.

(Act No. 68 of July 28, 1923, Laws of 1923, p. 442; as amended by Act No. 1 of August 27, 1923, Laws of 1923, Special Session, p. 2, and Act No. 6 of June 23, 1924, Laws of 1924, Special Session, p. 30.)

Section 6.—*Definition of the phrase ad valorem.*—For the purposes of this Act the phrase *ad valorem* shall be construed to mean the cost of an article after it is in the possession of a person, plus a reasonable benefit to be estimated at ten per cent over the amount of said cost, unless such person proves, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on said article is less than said ten per cent; * * * (as amended by section 1 of Act No. 1 of August 27, 1923).

Section 7 a.—*Definition of the word "acquire."* —Whenever in this Act the word "acquire" is used in any of its grammatical forms, it shall mean the material possession of the taxable article in Porto Rico to be exposed for sale, use or consumption (as amended by section 2 of Act No. 6 of June 23, 1924). * * *

Section 17.—*Dealers.*—That every person who himself or through his agents or employees, sells or offers or exposes for sale, or keeps on his business premises or on any premises contiguous thereto or connected therewith, whether used as a dwelling or otherwise, any article subject to taxation hereunder, for the purpose of selling the same, shall be regarded as a dealer. * * *

Section 20.—That there shall be levied, collected and paid, for one time only, as an internal-revenue tax on each of the following articles: * * *

18. *Motor vehicles.*— On every motor vehicle, automobile, * * * produced, manufactured, sold or used in Porto Rico, a tax of ten (10) per cent *ad valorem*. * * *

Section 29.—That the tax shall attach to such merchandise taxable hereunder as may be manufactured or produced in Porto Rico, as soon as the same shall have been manufactured or produced, but payment shall be made before such merchandise is removed from the factory, except as herein otherwise provided, and in such form as the Treasurer of Porto Rico may by regulation prescribe. * * *

Section 33.—The tax hereby prescribed on articles for sale, use, consumption or exhibition in Porto Rico, except as provided in section 29 of this Act, shall be levied as soon as they are on the market in possession of a dealer or commission merchant or the representative thereof in this island, who shall be responsible for the payment of said taxes upon transferring said articles to another dealer or consumer, or *upon acquiring them or having them in his possession*, and who shall pay such taxes *in one of the two following forms in accordance with such regulations as the Treasurer of Porto Rico may prescribe for the purpose*: (a) Upon acquiring the taxable articles and having them in his possession, by making entries of receipt and delivery in the stock and receipt and delivery book, and by simultaneously paying the tax by cancelling the corresponding stamps on an internal revenue invoice; or (b) as he disposes of the taxable articles. Persons acquiring taxable articles through channels other than the aforesaid dealers or commission merchants or their representatives, shall pay said taxes as soon as they obtain possession of the

articles and in accordance with the definition of *ad valorem* contained in this Act. * * * (as amended by section 5 of Act No. 1 of August 27, 1923).

Section 35.— * * * From and after the date on which this Act take effect, every person, who by himself or through his agents or representatives, acquires taxable articles for sale or transfer to another merchant or consumer, and on which the taxes specified by this Act have not been paid, shall keep in his commercial establishment, from which it shall not be removed, except by authorization of the Treasurer of Porto Rico, an official book wherein entries shall be made of all taxable articles at the time they are acquired. * * * *Provided*, That upon the taking effect of this Act, the stock on the market shall be classified as follows: * * *

(*b*) That subject to the payment of taxes on which such taxes have not been paid; * * * *Provided, further*, That merchandise already acquired under classes (*a*), (*b*) and (*c*), shall not be taxable under this Act; * * *

Section 41.—That the Treasurer of Porto Rico is hereby authorized to remit the tax accruing on any merchandise under the Internal-Revenue Laws of Porto Rico, upon presentation to him of satisfactory evidence of its actual destruction by fire or by *force majure* * * * Whenever the person liable for the payment of the internal-revenue tax on such destroyed or damaged merchandise is indemnified against the loss of said tax by a valid insurance claim, said tax shall not be remitted. * * *

Section 53.— * * * Every dealer having taxable articles in his possession upon which taxes have not been paid, shall provide a bond for the amount that the Treasurer of Porto Rico may require * * *.

APPENDIX B.

Extracts from Porto Rican tax statute of 1925.

(Act No. 85 of August 20, 1925, Laws of 1925, p. 584.)

Section 4—*Definition of the Phrase "Ad Valorem."*—For the purposes of this Act, the phrase *"ad valorem"* shall be construed to mean the cost of the article when in possession of the person, plus a reasonable profit to be estimated at ten (10) per cent of said cost, if such person fails to prove, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on such articles is less than the aforesaid percentage; * * *

Section 12—Every person who himself, or through his representatives, agents or employees, sells, offers or exposes for sale on his business premises or on any premises separate therefrom or connected therewith, whether used as a dwelling or for another purpose, any article subject to taxation hereunder, for the purpose of selling the same, shall be regarded as a dealer. * * *

Section 16—There shall be collected and paid, once only, an internal revenue tax on each of the following articles: * * *

15. *Motor Vehicles*—On every motor vehicle such as automobiles, * * * sold, transferred, used or consumed in Porto Rico, a tax of seven (7) per cent *ad valorem*. * * *

Section 23. * * * Every dealer having taxable articles in his possession upon which taxes have not been paid, shall furnish a bond in favor of The People of Porto Rico in such amount as the Treasurer of Porto Rico may require. * * *

Section 35.—That all excise taxes provided for in this Act shall be paid by affixing and cancelling internal-revenue stamps on such documents and articles, as for such purpose the Treasurer of Porto Rico may prescribe. * * * *Provided, further*, That the Treasurer of Porto Rico may affix such stamps on taxable articles acquired while former excise tax laws were in force and which articles are on the market when this Act takes effect. * * *

Section 37.—Dealers shall be liable for the payment of the tax upon selling or transferring the taxable article to another dealer or to a consumer.

Section 38.—The consumer shall be liable for the payment of the tax upon coming into possession of the taxable article for use or consumption in Porto Rico.

Section 39.—Taxes prescribed by this Act on the sale, transfer, use or consumption in Porto Rico of articles comprised in section 16 shall be paid by the dealer upon selling or transferring the taxable articles to another dealer or to a consumer.

Section 40.—A consumer possessing a taxable article on which the tax prescribed by this Act has not been paid, shall pay the said tax as soon as he shall have possession of such article taxable in Porto Rico for use or consumption.

Section 41.—From and after the date on which this Act takes effect, every article taxable hereunder in possession of a manufacturer, dealer or consumer, on which no internal revenue tax shall have been paid for any reason, shall be affected hereby and the taxes herein determined on such taxable articles shall be paid at the time and in the manner prescribed by this Act. * * *

Section 109.—From and after the date on which the Congress of the United States ratifies this

section, there shall be levied and collected by the Treasurer of Porto Rico on all articles enumerated in section 16 of this Act, imported into Porto Rico from any state, territory or district of the United States or from foreign countries, the same tax established by this Act for the manufacture or use of said articles, or for dealing therein. Said tax shall be paid at the time of the importation of said articles which shall not be delivered to the consignee thereof until the payment of the tax established in this section shall have been proven. Upon such payment the imported articles shall be exempt from all tax for the use thereof or for dealing therein.

APPENDIX C.

Extracts from Organic Act of Porto Rico.

(1) *Foraker Act.*

(Act of April 12, 1900, c. 191, 31 Stat. at L. 77.)

Sec. 3. * * *; and whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this Act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and

articles going into Porto Rico from the United States or coming into the United States from Porto Rico.

(2) *Jones Act.*

(Act of March 2, 1917, c. 145, 39 Stat. at L. 968.)

SEC. 58. That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled "An Act temporarily to provide revenues and a civil government for Porto Rico and for other purposes," approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.

(3) *United States Code.*

(Title 48, ch. 4, sec. 738.)

738. *Free interchange of merchandise with United States.*—All merchandise and articles coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry free of duty and in no event shall any duties be collected on said merchandise or articles (April 12, 1900, c. 191, sec. 3, 31 Stat. 77).

Note.—At the 69th Session of Congress section 3 of the Jones Act was amended (S. 4247; Public No. 797). The change does not affect the present cases: (a) It was enacted subsequent to their decision. (b) The legislature of Porto Rico has not yet sought to avail of the additional power conferred. (c) Congress has not *ratified* section 109

of the Act of 1925 (Appendix B). (d) The prohibition against *tariff duties*, contained in section 3 of the Foraker Act and *expressly* continued in force by section 58 of the Jones Act, is left unimpaired. (e) Authority to levy "internal-revenue taxes" on goods "as soon as" or after "brought *into* the island" does not warrant a *duty* on the *entry* of an *import*.

APPENDIX D.

Translation of extract from opinion of Supreme Court of Porto Rico.

IN THE

SUPREME COURT OF PORTO RICO.

BENITEZ SUGAR COMPANY, Plaintiff and Appellant, —vs.— RAMON ABOY, JR., Treasurer of Porto Rico, etc., Defendant and Appellee.	Appeal from the District Court of Humacao, No. 3223.

Opinion of the Court delivered by Mr. Justice Wolf.

San Juan, Porto Rico, March 11, 1925.

This was a suit to recover taxes paid under protest on various articles introduced into Porto Rico from the United States.

As presented by counsel in this case the principal question to be discussed is whether the Foraker Act, insofar as it prohibits a tax on imports, is still the law of this jurisdiction after the pas-

sage of our present Organic Act known as the Jones Act.

The Foraker Act provides:

> "And in no event shall any duty be collected after the first day of March, 1902, on merchandise and articles going into Porto Rico from the United States, or coming from Porto Rico into the United States."

Section 58 of the Jones Act says:

> "Section 58.—That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled 'An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed."

This section in itself would seem to continue in force the said cited section of the Foraker Act. We feel bound to hold that there is nothing in the Jones Act that by necessary implication caused a repeal of said section. We have the idea, besides, that it was the intent of Congress to make Porto Rico like the various states where duties on importations from one state to another are expressly excluded by the Constitution of the United States, as follows:

> "Art. 1, Sec. 9, subdivision 5.—No tax or duty shall be laid on articles exported from any State. Id., Section 10, subdivision 2.—No

> state shall, without the consent of the Congress, lay any imposts or duties on imports, or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

So much being premised, we may examine section 18 of the Act of 1921, it provides:

> "Sec. 18.—Motor vehicles and accessories.—On all motor vehicles, automobiles, motorcycles, sidecars for motorcycles, motors for bicycles and launches, auto-trucks, auto-cars, electric cars, auto-tractors and tractors (excluding agricultural tractors), and all solid or pneumatic tires, inner tubes, and on all parts and accessories for any of the articles enumerated in this paragraph, produced, manufactured, introduced or brought into Porto Rico, a tax of ten (10) per cent ad valorem."

As appellant points out, referring to the *Fantauzzi* case, reported under the name of *Successors of C. & J. Fantauzzi vs. Municipal Assembly of Arroyo*, 30 P. R. R. 390, these taxes sought to be imposed are clearly imposts or excises. They do not purport to be a property tax or one imposed on existing property but the whole scheme of said section 18 is to reach specialties like manufactures or importation and the like. We agree with counsel on both sides that the mere fact that section 18 does not use the word "import" can make no difference. To introduce or bring into Porto Rico is synonymous with importing. * * *

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 214

ADOLFO VALDES, PIO PEREZ, LUIS C. CUYAR, *et al.*, etc.,

Petitioners,

vs.

JUAN G. GALLARDO,

Treasurer of Porto Rico.

No. [redacted] 215

FINLAY, WAYMOUTH & LEE, INC.,

Petitioner,

vs.

JUAN G. GALLARDO,

Treasurer of Porto Rico.

No. [redacted] 216

ANGEL ABARCA PORTILLA, RAFAEL ABARCA PORTILLA, ENRIQUE ABARCA SANFELIZ, *et al.*, etc.,

Petitioners,

vs.

JUAN G. GALLARDO,

Treasurer of Porto Rico.

Petition for Writs of Certiorari to United States Circuit Court of Appeals for the First Circuit, and Brief in Support Thereof.

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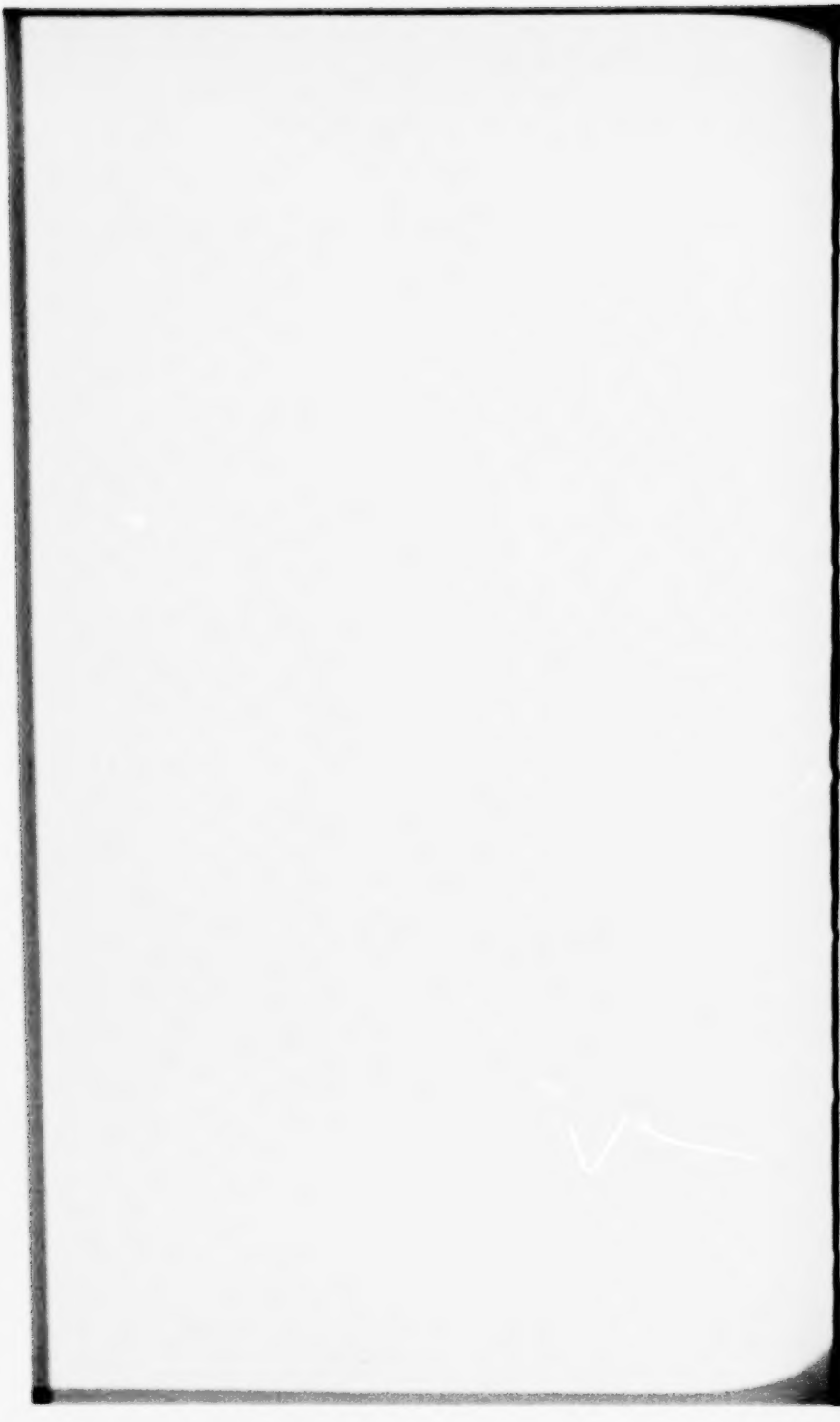

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Supreme Court of the United States,

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ANGEL ABARCA PORTILLA, RAFAEL ABARCA PORTILLA, ENRIQUE ABARCA SANFELIZ, *et al.*, *Petitioners,* *vs.* JUAN G. GALLARDO, Treasurer of Porto Rico.	No.

PETITION FOR WRITS OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petitioners above named respectfully show:

1. These are part of a numerous series of cases involving the validity, under the Constitution of the United States

and the Organic Act of Porto Rico, of a tax statute enacted by the Legislature of Porto Rico. They present questions as to the power of that Legislature to impose taxes upon articles of merchandise brought into Porto Rico from the United States and foreign countries. Some of these questions of Federal law have not been but should be settled by this court. Others have been decided in a way believed to be in conflict with applicable decisions of this court.

Discrimination against such articles is alleged, and the questions thus affect, not only all the People of Porto Rico, but, also, all merchants here and abroad who sell goods in Porto Rico.

The discrimination is such that if effected by a *State* it would invalidate the statute under the commerce clause of the Constitution. One of the important questions thus is: May Porto Rico burden or regulate commerce between Porto Rico and a State or a foreign country in a way in which a State cannot burden or regulate interstate or foreign commerce? Other questions are stated below.

2. Applications for certiorari in three other cases of the series are being simultaneously presented by other counsel. The questions there urged are present in these cases also; *but the questions here urged are not presented in those cases.* The six cases have been selected as test cases. Some of the others are being held in the court below under orders staying mandates and extending the time for seeking rehearing until after the decision of this Court in the cases now presented to it. There are still others in the court below not yet decided.

3. Petitioners are Porto Rican merchants. They deal in a great variety of articles which they import from foreign countries and from the States. They brought bills in equity in the District Court of the United States for Porto Rico to enjoin respondent, Treasurer of Porto Rico, from

enforcing the *excise* and *sales* taxes imposed by the statute in question.* The District Court dismissed the bills January 18, 1926 (R. 62, 63; see Opinion, R. 44-59). Upon appeals duly taken, the Circuit Court of Appeals, on January 7, 1927, enjoined enforcement of the taxes as to importations from *foreign countries* sold by the importers in the original packages (R. 137), but otherwise sustained the statute (See Opinion, R. 136-138; reported, *Porto Rico Tax Appeals*, 16 Fed. [2d] 545).

The first two cases in the caption of this petition were remanded for further proceedings not inconsistent with that opinion (R. 140). In the third case the decree of the District Court was affirmed (R. 141).

4. The statute assailed imposes two classes of taxes—one designated as *excise taxes* and the other designated as *sales taxes*. So far as here involved, both in reality are taxes on sales. As construed and applied by respondent, the tax in each instance is on *the first sale of the taxable article in Porto Rico* and applies to articles brought into Porto Rico from the United States and foreign countries as well as to articles manufactured or produced in Porto Rico. The basis of value upon which some of the taxes are fixed is the *cost* of the article "*plus* a reasonable profit to be estimated at ten per cent of said cost if such person (the person making the sale) fails to prove, to the satisfaction of the treasurer of Porto Rico, that the profit obtained on such article is less than the aforesaid percentage." In other instances the tax is computed upon the *sale price* of the article. After first imposing the tax upon "any articles

*Act No. 85 of August 20, 1925, approved by the Governor of Porto Rico on that day and entitled "An Act to Provide Revenues for the People of Porto Rico by Levying Certain Sales Taxes and Taxes for the Manufacture, Use, Sale and Consumption of Certain Products, and by the Levying of Certain Excise and License Taxes on Certain Occupations, Industries and Businesses; To Impose Certain Penalties; To Repeal the Laws in Force Providing for Excise and License Taxes and for Other Purposes."

the object of commerce", the statute excepts and relieves certain articles from the tax. Certain persons are also exempted.

5. In consequence of being imposed upon the first sale in Porto Rico, the taxes are discriminating in their incidence against articles imported into Porto Rico; and for that reason the law is claimed to be void. For example, a Porto Rican merchant buys shirts in New York for $32 per dozen, has them shipped to Porto Rico, and sells them there at retail at $4.00 each or $48.00 for the dozen. He has to pay a tax of 2% of $48, viz., 96 cents. If he bought the same shirts from a Porto Rican manufacturer he *would not have to pay any tax* because his sale would not be the first sale of those shirts in Porto Rico. It is true that the Porto Rican manufacturer would pay a tax when he sold the shirts to the merchant, but that tax would be 2% of only $32, viz., 64 cents. The tax upon imported shirts is thus fifty per cent. higher than the tax upon Porto Rican shirts. The merchant pays a tax if he buy abroad, but pays no tax if he buy in Porto Rico.

The court below utterly failed even to consider this question even though it was fully argued. Its reference to its prior decision in *West India Oil Co.* v. *Gallardo*, 6 Fed. (2d) 523, at R. 137, 138, is wholly inapposite because that case related only to automobiles, which are not manufactured in Porto Rico, and hence this question of discrimination was not and could not have been raised in that case. The present petitioners deal in articles of a class which *are* manufactured and produced in Porto Rico as well as brought there from the outside, and hence are directly affected by the discrimination.

6. In consequence of the different bases of value specified in the statute for the computation of some of the taxes, the statute operates unequally as between members of the

same class and therefore violates the uniformity clause of the Organic Act of Porto Rico and the equal protection of the laws clauses of the Organic Act and of the Fourteenth Amendment. The equal protection of the laws is denied, and a lack of uniformity is created, by inequality of valuation as well as by inequality of rate. For example, take an article the cost of which is $100, and the tax rate upon which is 7%. Dealer A sells the article, at a loss, for $50, but he yet must pay a tax of $7.00, for under Section 4 the basis of valuation for computing the tax is never less than cost, entirely irrespective of the sale price. Dealer B sells the same article at cost and pays a tax of $7.00. In its actual incidence, therefore, the tax on A's sale is at the rate of 14%, while the tax on B's sale is at the rate of 7%. Dealer C sells the same article for $110 and Dealer D sells the same article for $120. Under Section 4 both C and D pay a tax of $7.70 (7% of cost plus 10%), so that the actual rate paid by D is a less percentage of his selling price than is the rate paid by C. That, too, despite the fact that D made more money on his sale. In other words, gross profits up to 10% are taxed, but gross profits in excess of 10% are free of tax.

This question, also, was utterly ignored in the opinion of the court below.

7. Although the Fourteenth Amendment does not require uniformity of taxation, the Organic Act of Porto Rico does. In addition to a requirement of equal protection of the laws, it provides that "the rule of taxation in Porto Rico shall be uniform" (Act of March 2, 1917, 39 Stat. 951, Sec. 2). In consequence, therefore, of the fact that out of the total class of "articles the object of commerce" the tax statute here assailed specifies certain articles which are thereby exempted from the taxes, and out of the total class of "persons making such sales" certain of those persons are exempted, these cases squarely pre-

sent the question whether a legislature which is expressly required to impose taxes according to uniform rule has the power to grant exemptions. *That question, we believe, never has been passed upon by this court.* The prevailing rule in the State courts is that a requirement of uniformity precludes the legislature "from either expressly exempting part of the property from taxation, or accomplishing the same result by a failure to tax such property" (*Cooley on Taxation*, 4 ed. sec. 273).

This question, also, has been ignored by the court below.

8. If the exemptions granted by Section 83 of the statute here assailed be regarded as classifications, as distinguished from exemptions, they violate the Fourteenth Amendment (and also the equal protection clause of the Organic Act) because the classifications, so-called, are unreasonable and arbitrary. The statute excludes gas and electric current but includes kerosene and tallow candles; excludes fertilizers but includes seeds and agricultural implements; excludes crops and livestock when sold by agriculturists, but includes them if sold by someone else; excludes sales by agriculturalists of their crops and livestock, but includes their sales of milk and cream and pork and beef and mutton; excludes newspapers, but includes magazines; excludes newspaper advertisements, but includes magazine advertisements; excludes literary and scientific and philosophical works, but includes Bibles and other religious works. Wholesalers and retailers of *non-domestic* products are subjected to the tax, while wholesalers and retailers of domestic products are exempted.

The court below failed to consider this question also.

9. In short, the very brief *per curiam* opinion by which these cases were disposed of below contains no discussion of the vitally controlling questions, and we feel justified in

saying that the belief and intent of the court below was that the cases should come here for final determination.

10. In addition to the foregoing, we feel we should call the court's attention to the fact that *since the decrees below were rendered*, and during the closing days of the last session of Congress, the Organic Act of Porto Rico was amended in two respects which may be claimed to have a bearing upon these cases (Act of March 4, 1927, 69th Congress, Public No. 797, S. 4247). *First*, Section 3 was amended by inserting a clause to the effect that the internal revenue taxes there authorized may be levied and collected on the articles subject to said tax "as soon as the same are manufactured, sold, used, or brought into the island; provided, that no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico." *Second*, Section 48 was amended by inserting the following: "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

Whatever else may be said of the amendment to Section 3, it certainly declares expressly what petitioners insist always was the law, viz., that there must be no discrimination against articles from the United States and foreign countries.

The amendment to Section 48 already is being invoked as a bar to other cases now pending in the court below, and thus raises several questions. See Brief at pp. 29-33 below. If held applicable to these cases a constitutional question may be presented as to whether the amendment is not invalid as depriving taxpayers of any remedy whatever.

These questions affect many other cases and it is to the public interest that they be decided speedily; and this constitutes an additional ground for certiorari in these cases.

11. There is presented herewith a certified transcript of the records of the above entitled causes in the Circuit Court of Appeals.

WHEREFORE petitioners respectfully pray for the allowance of writs of certiorari to the United States Circuit Court of Appeals for the First Circuit, to the end that these causes may be certified to this court for determination by it as provided in Section 240-A of the Judicial Code as amended by Act of February 13, 1925.

CARROLL G. WALTER,
Counsel for Petitioners.

I hereby certify that I have examined the foregoing petition and that in my opinion the same is well founded and that the cases are such that the prayer of the petition should be granted by this court.

CARROLL G. WALTER.

BRIEF IN SUPPORT OF FOREGOING PETITION.

The opinions of the court below are reported in 16 Fed. (2d) 545, and are printed at R. 116-124; 136-138. The opinion of the District Court, unreported, is printed at R. 44-59.

Grounds of Jurisdiction.

The decrees to be reviewed were rendered January 7, 1927 (R. 140, 141).

The claims advanced in the lower courts as the basis of this court's jurisdiction are that the Porto Rican tax statute, Act No. 85 of August 20, 1925, is in conflict with the Constitution of the United States and the Organic Act of Porto Rico (Act of Congress of March 2, 1917, 39 Stat. 951). These claims were made in the bills (R. 1-8; 70-79; 88-95) and repeated in the assignments of error (R. 64-68; 82-85; 114-116).

Jurisdiction of this court is invoked under Sec. 240a of Jud. Code as amended by Jurisdictional Act of February 13, 1925 (266 U. S. 692, 693), the language of which sustains the jurisdiction.

Statement of the Case.

The bills in all the cases are substantially identical. The one by Finlay, Waymouth & Lee, Inc., was disposed of in the District Court upon a motion to dismiss which, of course, admitted all averments of fact therein contained. The bills attack the validity of the statute. The case thus may be sufficiently stated by summarizing the statute and the averments in the one bill which was dismissed on motion.

The Statute.

The statute here assailed is exceedingly lengthy, and quotation in full would needlessly burden the Court.

Somewhat expanding the summary given in paragraph 4 of the petition, it is sufficient to say:

Title I defines the terms used, and includes Sections 4 and 5, which read as follows:

> "Section 4.—*Definition of the Phrase 'Ad Valorem.*—For the purposes of this Act, the phrase '*ad valorem*' shall be construed to mean the cost of the article when in possession of the person, plus a reasonable profit to be estimated at ten (10) per cent of said cost, if such person fails to prove, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on such articles is less than the aforesaid percentage; *Provided*, That the word 'person' as used in this section shall have the meaning given thereto in section 5 of this Act.
>
> "Section 5.—*Person.*—The word 'person' as used in this Act, shall include not only all natural persons and all manufacturers or dealers, but also all partnerships, associations of all classes, limited liability joint-stock companies (sociedades anónimas), companies, corporations or any other artificial person."

Title II is headed "Excise Taxes." Section 16 thereof says: "There shall be collected and paid, once only, an internal-revenue tax on each of the following articles:" Forty-four articles are then enumerated, including matches, arms and ammunition, motor vehicles, pianos, phonographs, glass show cases, cash registers, adding machines, typewriters, linoleum, &c. As to most of the articles the tax is fixed at a specified per cent *ad valorem*. As to others it is of a specified amount on specified units of measure,

e. g., twenty cents on each gross of boxes of matches. In each instance it is stated to be upon the production, manufacture, use, sale, transfer, or consumption of the designated articles. So far as involved in these cases the tax is on articles *sold*.

The tax is to be paid by affixing and cancelling revenue stamps on documents or articles (Sec. 35). Dealers are liable for the payment of the tax upon selling or transferring the taxable article to another dealer or consumer (Sec. 37). The tax is to be paid at the time of the sale or transfer by a dealer to another dealer or consumer (Sec. 39). The tax on articles manufactured in Porto Rico is to be paid by the manufacturer, who is declared to be "the only one liable for said taxes upon selling or otherwise disposing of the same and before removing them from the factory" (Sec. 42).

There are elaborate inquisitorial provisions enabling the Treasurer to ascertain the amount of taxes due and heavy penalties for failure to pay. Any person who sells or transfers any article subject to the tax without paying the tax at the time is *guilty of a misdemeanor* (Sec. 50), the penalty for which is not less than $100. or more than $1,000. or confinement in jail for a term of not less than thirty days or more than one year, and for the second and subsequent offenses both penalties (Sec. 103).

Title III is headed "Sales Taxes." Section 62 thereof provides:

> "There shall be levied and collected on the sale of any articles the object of commerce, not specified in Section 16 of this Act or exempted from taxation as provided in said section,* a tax of two (2) per cent.

* "The words, "said section," in the phrase "or exempted from taxation as provided in said section" undoubtedly were intended to be "this title," for the exemptions are specified in Section 83 of the Statute and not in Section 16.

on the price or value of the daily sales of such articles, whether such sales are for cash or credit, which tax shall be paid at the end of each month by the person making such sales."

The Treasurer of Porto Rico, respondent here, has construed Section 62 as imposing the sales tax upon only one sale of the same article and is collecting and requiring the payment of such tax only upon the *first sale of the taxable article in Porto Rico;* and according to his construction of the law retailers and other persons are only required to pay the tax where they purchase the taxable articles from manufacturers or dealers in continental United States or in foreign countries.*

Affidavits showing the gross proceeds of monthly sales must be filed each month (Sec. 63) and the tax is payable without prior demand (Sec. 68).

The tax is to be paid by affixing internal revenue stamps "to documents prepared for that purpose by the Treasurer of Porto Rico" and cancelling said stamps (Sec. 71).

"Every manufacturer, wholesale dealer, retail dealer, representative, commission merchant or any other person making sales" is required to keep books of account as prescribed by the Treasurer and to exhibit the same on demand (Sec. 69).

There are stringent provisions for enforcing the law and severe penalties for violation. The Treasurer may impose administrative fines of twenty-five dollars for each failure to observe his regulations (Sec. 75). Failure to pay the tax within the time and in the manner provided by the law causes a penalty of ten per cent of the amount

*See paragraph 10 of bill in first case (R. 5), which is admitted in paragraph 10 of answer (R. 11); paragraph 12 of bill in second case (R. 75, 76), admitted by the motion to dismiss (R. 79, 80); paragraph 7 of bill in third case (R. 92), admitted in paragraph 7 of articles thereto (R. 96). The word "whether" in the 12th line of paragraph 10 at R. 5 is a misprint for "where".

due (Sec. 77). Failure to file the monthly statements or refusal to pay constitute misdemeanors with the penalties above specified (Secs. 80, 81, 82).

Certain *exemptions* from the taxes are provided for in Section 83 of the statute, which reads as follows:

> "Any person comprised within the provisions of Section 62 of this Act, except manufacturers whose monthly sales do not exceed one hundred (100) dollars, shall be exempt from the payment of the tax specified in this section; provided, that when one person alone shall have several businesses, under separate accounts, the amounts of the monthly sales of these should together amount to less than one hundred (100) dollars so as to be comprised within the exemption hereby established; Provided further, That the tax provided by Section 62 of this Act shall not attach to (1) food stuffs; (2) fluid gas; (3) electric current; (4) fertilizers, as well as all raw material used in the manufacture of fertilizers; (5) charcoal and wood; (6) jewels and precious stones and semi-precious stones; (7) the sales made by agriculturists of their crops and live stock; (8) the sale of newspapers, to newspaper advertisements and literary, scientific, and philosophical works and to public school text books."

The Bill.

The bill sets forth various provisions of the statute, including the definition of the phrase *ad valorem* contained in Section 4 thereof, and the exemption specified in Section 83 thereof, and alleges, among other things:

1. That the so-called excise tax is a discriminating tax that operates unequally upon members of the same class in which plaintiff is included, namely wholesale and retail dealers; that while the tax is on sales the value of the articles upon which the different percentages are assessed

is an entirely arbitrary value or amount that bears no relation to the actual sale price or amount, *e. g.*, a dealer whose gross profit upon the article sold is fifty per cent. pays a tax of approximately five per cent. upon the actual sales price as against a tax of seven per cent. upon the sale of the same article by a dealer whose actual gross profit is ten per cent. or less; and that where a dealer is compelled to sell an article at less than cost the tax is none the less based upon actual cost and the rate of tax is in excess of that imposed on other dealers who sell at cost or at some profit (R. 72).

2. That other wholesale and retail dealers in competition with plaintiff sell some of the same taxable articles at a greater profit than does the plaintiff, and by reason of such larger profits pay a lower rate of tax upon the actual sale price of such articles (R. 72, 73).

3. That said excise tax discriminates against articles manufactured or produced in continental United States and in favor of articles produced or manufactured in Porto Rico in that the tax imposed upon the article the product or manufacture of Porto Rico is upon the cost of the manufacturer or producer of the domestic article plus ten per cent., while the tax on the article imported from continental United States is upon a value or amount that includes not only the manufacturer's but also the wholesaler's or retailer's assumed profit of ten per cent. upon a cost in excess of the manufacturer's cost plus ten per cent.; that this inequality and discrimination is the consequence and result of imposing the tax upon the first sale in Porto Rico instead of imposing the same on the ultimate sale to the consumer; and that plaintiff is thus compelled to pay a tax on its wholesale and retail sales where other wholesalers and retailers purchasing their goods in Porto Rico pay no tax whatever, and the plaintiff is compelled

to pay a higher tax on the imported articles than is levied on the same domestic articles (R. 73).

4. That out of the mass of citizens who sell articles the object of commerce the law segregates from the operation thereof those whose monthly sales of articles the object of commerce do not exceed $100 and agriculturists with respect to their crops and livestock and vendors of fertilizers and materials for the manufacture of fertilizers, all of whom are members of the same class (R. 75).

5. That there is a large number of retail dealers in Porto Rico who sell principally foodstuffs but who also carry in stock and sell in competition with the plaintiff hardware, implements and other taxable articles, whose individual monthly sales of such taxable articles do not exceed $100 but whose aggregate sales of such articles amount to several thousand dollars monthly; that the principal business in Porto Rico is agriculture and that sales of agricultural products comprise more than one-half of all sales of articles the object of commerce (R. 75).

6. That by reason of the defendant's construction of the law as imposing the sales tax upon only the first sale of a taxable article in Porto Rico the sales tax also discriminates unlawfully against manufactures and products of continental United States and in favor of domestic or Porto Rican manufacturers and products, and imposes an unequal burden on the former (R. 75, 76).

7. That the defendant requires of the plaintiff the payment of the sales tax on articles imported by the plaintiff from foreign countries and sold by the plaintiff in the original packages or containers in which such articles are imported (R. 76, 77).

8. That both the taxes aforesaid are imposed directly upon the vendors and as to the sales tax the plaintiff will not be able to collect the same from purchasers; that an increase in prices to include such tax or the attempt to pass the same on to the purchasers will result in the destruction of the plaintiff's wholesale and retail business, in that dealers heretofore purchasing from the plaintiff will purchase direct from dealers in continental United States, and the plaintiff's retail business will for the same reason be seriously impaired (R. 77, 78).

Specification of Errors.

1. The court below having sustained petitioners' contention that Porto Rico cannot tax a sale, by the importer in the original package, of an article imported *from a foreign country*, that question is not here presented.

2. Whether or not Porto Rico can tax a similar sale of an article brought into Porto Rico *from the United States* is specifically dealt with in a separate petition by other counsel for writs of certiorari in three other cases of this series, *viz.*, the *Smallwood*, *Orondez*, and *Insular Motor Corporation* cases, the petitions in which are to be presented simultaneously with this petition. Hence that question is not here discussed.

3. **The insistence here relied upon** is that, entirely aside from the two questions above noted, the statute is invalid *in toto* for four reasons:

(*a*) The taxes are discriminating in their incidence against non-domestic articles and against dealers in such articles. See paragraph 5 of petition, *supra*.

(*b*) The taxes lack uniformity and deny the equal

protection of the laws because computed upon different bases of values and thus result in inequality of rate as between members of the same classes of articles and dealers. See paragraph 6 of petition, *supra*.

(*c*) The taxes lack uniformity because certain articles and persons are exempted therefrom. See paragraph 7 of petition, *supra*.

(*d*) Even if classification be permissible under a requirement of uniformity, and even if the exemptions in this statute be regarded as classifications, the taxes nevertheless deny the equal protection of the laws because the so-called classifications are unreasonable and arbitrary. See paragraph 8 of petition, *supra*.

ARGUMENT.

I.

The taxes are discriminating in their incidence against non-domestic articles, and hence violate the commerce clause of the Constitution; and that clause is applicable to Porto Rico.

The settled rule upon this subject is succinctly stated in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 516, in which this court said:

> "A State tax upon merchandise brought in from another State *or upon its sales, whether in original packages or not*, after it has reached its destination and is in a state of rest, is lawful *only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State.*"

That rule is supported by a long line of cases.*

It makes no difference whether the discrimination is intentional and deliberate and appears upon the face of the statute, or whether it is inadvertent or incidental or results solely from the practical effect or necessary operation of the statute.** The validity of the statute and of the taxes imposed thereby must be determined, not by the phraseology of the statute, but by its practical operation and effect and by the real nature and actual incidence of the taxes.†

Discrimination may result from inequality of valuation, or the taking of different bases of value, as well as from inequality of rate.††

Consequently, if these taxes, as they actually fall upon non-domestic articles be in fact computed upon a higher basis of value than in the case of domestic articles, a discrimination clearly results.

As the taxes are imposed upon the first sale of an article

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*Woodruff v. Parham, 8 Wall. 123, 140; Ward v. Maryland, 12 Wall. 418, 429; Welton v. Missouri, 91 U. S. 275, 278; Guy v. Baltimore, 100 U. S. 434, 439, 443; Webber v. Virginia, 103 U. S. 344, 350, 351; Walling v. Michigan, 116 U. S. 446, 455, 459, 460, 461; Minnesota v. Barber, 136 U. S. 313, 319, 320, 322, 323, 326; Brimmer v. Rebman 138 U. S. 78, 82, 83; Voight v. Wright, 141 U. S. 62, 66; Darnell & Son v. Memphis, 208 U. S. 113, 119, 120; Bethlehem Motors Co. v. Flynt, 256 U. S. 421, 426, 427; Pennsylvania v. West Virginia, 262 U. S. 553, 596.

**Minnesota v. Barber, supra; Brimmer v. Rebman, supra; Sonneborn Bros. v. Cureton, supra.

†Hanson v. Kentucky Distilleries Co., 255 U. S. 288, 292; St. Louis & S. W. Ry. Co. v. Arkansas, 235 U. S. 350, 362; Crew Levick v. Pennsylvania, 245 U. S. 292; Standard Oil Co. v. Graves, 249 U. S. 389, 394; Shaffer v. Carter, 252 U. S. 37, 55; St. Louis Compress Co. v. Arkansas, 260 U. S. 346, 348; Lacoste v. Department of Conservation, 263 U. S. 545, 550; Galveston &c. Ry. Co. v. Texas, 210 U. S. 217, 227; Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292, 298.

††Green v. Louisville & Interurban R. R. Co., 244 U. S. 499, 515, 516; Cummings v. National Bank, 101 U. S. 153, 158; Raymond v. Chicago Traction Co., 207 U. S. 20, 36, 37; Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445; Johnson v. Wells, Fargo & Co. 239 U. S. 234, 241, 242, 243; Cooley on Taxation, 4 Ed. § 295.

in Porto Rico, it necessarily results that as to *domestic* articles the taxes (except those affected by Section 4, which produces a further inequality to be hereafter noted) are based upon the manufacturer's or producer's sale price, while as to *non-domestic* articles, *i. e.*, articles brought into Porto Rico from the States or from foreign countries, the taxes are computed upon the importer's sale price; and that price includes two elements of value not present in the manufacturer's or producer's price, *viz.*, the cost of transportation and the importer's profit.

Stated in different form, the discrimination is that wholesalers and retailers of *domestic* articles are not taxed *because* they sell domestic articles, while wholesalers and retailers of *imported* articles *are* taxed *because* they sell articles manufactured or produced outside of Porto Rico.

For a concrete illustration of how the discrimination works, see paragraph 5 of petition, *supra*.

This discrimination, based upon the *place of origin* of the goods, and resulting from the necessary operation of a statute which puts the tax on the first sale in Porto Rico instead of upon the sale to the ultimate consumer, renders the statute invalid if the authorities cited above apply to Porto Rico.

Hence the question: MAY PORTO RICO REGULATE OR BURDEN COMMERCE BETWEEN PORTO RICO AND A STATE OR A FOREIGN COUNTRY IN A WAY IN WHICH A STATE CANNOT REGULATE OR BURDEN INTERSTATE OR FOREIGN COMMERCE?

It is settled that "the Constitution of the United States is *in force* in Porto Rico" even though not all its provisions are "applicable" to that island.

Balzac v. *Porto Rico*, 258 U. S. 298, 312, 313.

The commerce clause, taken literally, refers only to commerce "with foreign nations and among the several states and with the Indian tribes." But it has been held

to apply to commerce between a State and a Territory and between a State and the District of Columbia.

> *Stoutenburgh* v. *Hennick*, 129 U. S. 141;
> *Hanley* v. *Kansas City Southern Ry Co.*, 187 U. S. 617.

It has been held, too, that Congress cannot delegate its power to regulate such commerce to a legislative assembly of the District of Columbia.

> *Stoutenburgh* v. *Hennick*, *supra*, at p. 149.

No reason can be conceived, we submit, why the rule with respect to Porto Rico should be different from what it is with respect to the District of Columbia and the other territories. On the contrary, all the reasons which caused the framers of the Constitution to include the commerce clause among its provisions are just as cogent and forceful with respect to Porto Rico as with respect to other territories or possessions. That clause was inserted principally in order to end the evils of *discrimination* by one State against another. Discrimination by Porto Rico against the States, or by the States against Porto Rico, would be just as great an evil.

In *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, it was said:

> "The genius and character of the whole government seem to be, that its action (the action of the commerce clause) is to be applied to *all the external concerns of the nation*, and to *those internal concerns which affect the states generally*; but not to those which are completely within a particular state, which *do not affect other states*, and with which it is not necessary to interfere, *for the purpose of executing some of the general powers of the government*. The *completely internal commerce* of a state, then, may be considered as reserved for the state itself."

Commerce between Porto Rico and a foreign country is one of the "external concerns of the nation" just as much as commerce between New York and a foreign country. Commerce between Porto Rico and the States is something which clearly "affects the States generally." Commerce between Porto Rico and a State is *not* "completely internal commerce of a State" any more than is commerce between New York and New Jersey. There is no more reason why Porto Rico should be permitted to regulate commerce between Porto Rico and a State than there is why New York should be permitted to regulate commerce between New York and New Jersey. Such regulation by Porto Rico is just as much opposed to the "genius and character of the whole government," and freedom from such regulation is just as essential "for the purpose of executing some of the general powers of the government."

In the *Minnesota Rate Case*, 230 U. S. 352, 399, it was said that "the grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority."

Commerce between Porto Rico and the States and foreign countries clearly is a subject of that character. The States themselves, as well as Porto Rico and its people, are intensely interested in seeing that Porto Rico cannot regulate commerce between it and a State; for if such a power exist in Porto Rico the States may be as adversely affected as if another State could make such regulation.

The enumeration of "foreign nations" and "several States" and "Indian tribes" found in the commerce clause undoubtedly was intended to include *all* commerce other than purely internal commerce within the confines of a

single State. It was intended that Congress should have exclusive control over all commerce, other than such purely internal commerce, whether between "States" accurately so-called or other political divisions of the nation of lesser sovereignty. The freedom of commerce established by the commerce clause of the Constitution is the one thing which has enabled the United States to maintain itself as a nation. It is unthinkable that one of its creatures has power to destroy that freedom.

When the States surrendered to Congress their power to regulate their external commerce, they did it for a *quid pro quo*, *i. e.*, the assurance that they themselves could not be discriminated against. They never contemplated that in the course of time there would be created at their doors a hybrid creature to which the enumeration in the Constitution would not apply.

Of course, they realized that there were territories, but they took the precaution of confiding to Congress the power to regulate those territories (Art. 4, Sec. 3, cl. 2), and thus gave further evidence of their determination to secure uniformity and the absence of discrimination. They would have been surprised indeed if they had been told that from those territories Congress could erect a super-sovereignty endowed with power to create the very discrimination against which they were so sedulously guarding.

II.

The *ad valorem* excise tax operates unequally between members of the same class, and therefore lacks uniformity and denies the equal protection of the laws in violation of the Organic Act of Porto Rico and of the Fourteenth Amendment to the Constitution.

By virtue of Section 4 of the statute (*supra*, p. 10), the excise taxes, so far as imposed upon an *ad valorem* basis, are computed upon the cost of the article even though the article be sold for less than cost. In such a case the basis of value upon which the tax is computed is *higher* than the sale price. On the other hand, where the sale price is greater than cost plus ten per cent., the basis of value is *lower* than the sale price.

For an illustration of how this inequality works, see paragraph 6 of petition, *supra*.

Repeated decisions establish that where, despite an apparent equality of rate, taxes are levied upon *different bases of value*, they are void for want of uniformity and also for want of equal protection of the laws.* The case of *Johnson* v. *Wells, Fargo & Co.*, 239 U. S. 234, affords a pertinent illustration. There the tax was held invalid because in the case of certain corporations gross income was given controlling effect in determining value, whereas in the case of individuals and other corporations actual value, irrespective of income, was given controlling effect. Here the effect of Section 4 is to make gross income the controlling factor in determining the tax in those cases

*Cooley on Taxation, 4 Ed. § 295; *Green* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 515; *Cummings* v. *National Bank*, 101 U. S. 153, 158; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 36, 37; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 445; *Johnson* v. *Wells, Fargo & Co.*, 239 U. S. 234, 243.

in which the actual gross happens to coincide with cost plus ten per cent. and to disregard the gross income and substitute a purely arbitrary valuation in those cases in which the actual profit is higher than cost plus ten per cent. or less than cost.

We repeat that the actual operation and effect of the law, and not the form or phraseology of the statute, control in determining validity. See particularly *St. Louis S. W. Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362.

III.

The sales tax is wholly void because the exemptions contained in Section 83 make it repugnant to the uniformity clause of the Organic Act.

We concede that the Fourteenth Amendment does not require uniformity of taxation (*Swiss Oil Corporation* v. *Shanks*, decided February 21, 1927). Our contention under this point is based solely upon the requirement of uniformity contained in the Organic Act of Porto Rico.

In legislating for Porto Rico, Congress was not content, so far as taxation is concerned, with requiring the equal protection of the laws. After providing for that in the first paragraph of Section 2 of the Organic Act, it went further and, in a subsequent paragraph of the same section, expressly required that "the rule of taxation in Porto Rico shall be uniform".

The difference is emphasized by *Green* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 512, 519, in which this court held the tax invalid under the uniformity clause of the State Constitution, and then stated that in view of that conclusion it was unnecessary to consider whether the tax

was also invalid under the equal protection clause of the Fourteenth Amendment.

By Section 62 the sales tax here involved is imposed on the sale of "any articles the object of commerce not specified in Section 16 of this act (the section imposing the excise tax) or exempted from taxation as provided in said section" (error for Section 83); and the tax is to be paid "by the person making such sale".

By Section 83 any person comprised within the provisions of Section 62 (except manufacturers) whose total monthly sales do not exceed $100 is exempted from the payment of the tax specified in Section 62. By the same section it is further provided that the tax imposed by Section 62 "shall not attach" to certain specified articles.

Thus, out of the total class of "articles the object of commerce" certain specified articles are exempted; and out of the class of "persons making such sales" certain of those persons are exempted.

The question is thus squarely presented whether a legislature which is expressly required to impose taxes according to the rule of uniformity has the power to create exemptions.

Requirements of uniformity in taxation are found in the constitutions of many of the States. In some the requirement is expressly limited to uniformity within a class, but as found in the Organic Act of Porto Rico the requirement is general, universal and unqualified. If such a requirement were construed as meaning only uniformity within a class, the requirement would be rendered meaningless. For if only that were intended, the entire object would have been accomplished by the clause providing for equal protection of the laws. The fact that Congress required uniformity, in addition to requiring equal protection of the laws, thus impels a holding that this uniformity clause is to be construed as permitting no exemptions whatever.

That is the rule established by the weight of authority in the State courts.*

FURTHERMORE: Even if it were held that the uniformity clause as found in the Organic Act of Porto Rico does not absolutely prohibit any exemptions whatever—that it merely requires uniformity within a class—this sales tax yet could not be sustained. The legislature here has not attempted to classify and impose the tax upon some classes and exempt other classes. It has merely granted exemptions; and *exemption is not classification* (Sec 37 *Cyc*, 884; *Adams* v. *Kuykendall*, 83 Miss. 571, 587). The legislature here has put into one class (*a*) all articles the object of commerce which are not subjected to the excise tax, and (*b*) all persons making sales of such articles. Then, out of those classes, it has exempted (*a*) certain specified articles which clearly fall within the class of articles of commerce not subjected to the excise tax, and (*b*) all persons, except manufacturers, whose total monthly sales do not exceed $100.

That is not classification but merely the exemption of certain persons within the class.

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*Attention is called to the following authorities, analysis of which at this time would unduly expand this brief. *Cooley on Taxation*, 4 Ed., Sec. 273; *Consolidated Coal Co.* v. *Miller*, 256 Ill. 149, 152, 153; *People* v. *National Box Co.*, 248 Ill. 141, 146; *People* v. *McCreery*, 34 Calif. 432, 455, 457, 460, 461, 462; *People* v. *Eddy*, 43 Calif. 331, 339, 340; *State* v. *Duluth & Iron Range R. R. Co.*, 77 Minn. 433, 437; *State* v. *Tennessee Co.*, 71 Neb. 320, 334, 335; *Georgia Railroad Co.* v. *Wright*, 81 Ga. 539, 660; *Atlanta National Bank* v. *Stewart*, 109 Ga. 60, 97, 97; *Commonwealth* v. *Dana*, 2 Cush. 407, 460; *Farnham* v. *Layman*, 102 Fed. 193, 194, 195; *State National Bank* v. *Memphis*, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A. (N. S.), 663, 668; *Ex parte Woods*, 57 Tex. Crim. App. 575, 108 S. W. 1171, 16 L. R. A. (N. S.), 450, 452, 459; *City of Zanesville* v. *Trustees of Muskingum County*, 5 Ohio, 90, 109, 592, 593; *State ex rel. Freeman* v. *Indianapolis*, 69 Ind. 375.

IV.

Even if the exemptions be regarded as classifications they deny the equal protection of the laws because unreasonable and arbitrary.

"The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment", and arbitrary selection can never be justified by calling it classification (*Gulf Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 159, 165, 166). The classification always "must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed" and "cannot be arbitrarily made without any substantial basis" (*Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417, 418). And all persons similarly circumstanced must be treated alike (*Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415).

A classification of corporations into foreign and domestic for the purpose of taxation is arbitrary and a denial of the equal protection of the laws (*Southern Ry. Co.* v. *Greene, supra*). A statute under which domestic corporations doing all their business in the State are taxed upon all income while others doing all their business outside the State are exempt is unconstitutional for the same reason (*Royster Guano Co.* v. *Virginia, supra*). A statute which puts shares of stock in a class for purposes of taxation and then "breaks into the class and with eyes shut strikes some and lets others go" is likewise void (*People ex rel. Farrington* v. *Mensching*, 187 N. Y. 8, 21). Electric light plants and gas plants cannot be put into separate classes for the purpose of taxation because both furnish light, heat and power and there hence is no fair and substantial basis for the classification (*Lincoln Gas & Electric Light Co.* v. *City of Lincoln*, 182 Fed. 926). Neither can a classification rest

merely upon the amount of business done (*Colting* v. *Kansas City Stockyards Co.*, 183 U. S. 13, 111, 112; *State* v. *Mitchell*, 97 Maine 66, 73, 53 Atl. 887) nor upon the place of origin of the goods taxed (*State* v. *Voigt*, 74 Vt. 93, 52 Atl. 973; *People ex rel. Phillips* v. *Raynes*, 150 N. Y. App. Div. 417, 120 N. Y. Supp. 1051, affirmed 208 N. Y. 653).

In accordance with these principles, the exemptions (or classifications, if such they be) contained in Section 50 cannot be sustained. Persons whose monthly sales amount to $401 are taxed, while those whose monthly sales amount to $400 are exempt. Foodstuffs and jewels are exempted while hats and shoes and clothing are taxed. Kerosene and tallow candles are taxed while gas and electric current are exempt. Fertilizers are excluded but seeds and agricultural implements are included. Crops and livestock are taxed or exempted according to whether the person who sells them is or is not an agriculturist. Agriculturists must pay a tax upon the sale of milk and cream but not upon the sale of their crops. If they kill a hog and sell the pork they must pay a tax, but if they sell it on the hoof they are exempt. Newspapers and newspaper advertisements are free, but magazines and magazine advertisements are taxed. A copy of Shakespeare, or of Huxley, Darwin, or Voltaire may be had free, but upon the sale of a Bible there must be a contribution to the public treasury.

The distinctions thus drawn in this statute are, to say the least, as fanciful as those denounced in *Southern Railway Co.* v. *Greene* and *Royster Guano Co.* v. *Virginia*, referred to above.

Finally, and perhaps even more important, the necessary consequence of imposing the tax upon the first sale in Porto Rico is that *wholesalers and retailers of non-domestic products are subjected to the tax while wholesalers and retailers of domestic products are exempt*. When a San Juan merchant sells a suit of clothes he has purchased from the manufacturer in New York, he must pay the tax. When

a competing merchant in San Juan sells a similar suit which was made in Porto Rico, he does not have to pay any tax. The tax thus actually falls upon some wholesalers and retailers and does not fall upon others. *In its actual incidence the tax is thus laid upon some members of a class and not upon others, according to whether they sell domestic or non-domestic products.* Stated in a different form, wholesalers and retailers are classified according to the place of origin of the goods they sell, and that cannot be sustained (See *State* v. *Hoyt*, and *People ex rel. Phillips* v. *Raynes*, *supra*).

V.

Effect of amendment of Section 48 of Organic Act by Act of March 4, 1927.

1. The amendment by its terms is inapplicable to *pending* cases. Its language is that no suit to restrain the assessment or collection of a tax "shall be maintained in the District Court of the United States for Porto Rico."

In *Moon* v. *Durden*, 2 Exch. 22 (1848), a statute which provided that "no suit shall be *brought or maintained* in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager" was held inapplicable to cases pending at the time of the enactment of the statute. Alderson, *B.*, said (p. 41):

> "If it had been stated 'that no action shall be brought,' *or only 'that no action shall be maintained,'* it seems to me clear that we should have considered the words 'brought' and 'maintained' as synonymous, *and as prohibiting the success of future suits alone.* And although the use of both in one sentence makes this *less obvious*, yet, when we consider that to give the more strict interpretation to the word 'maintained'

> will compel us to suppose, without further evidence, that the legislature contemplated so gross an act of injustice as, without compensation, to take away an existing right of action already pending, *and that, too, with no provision even for the costs incurred in the enforcing of what was, before the act, a legal right.* I am not disposed to put such a construction on the word, but to treat it, as I think the legislature intended it, as a redundant expression only."

That case was cited and followed in *Grasso* v. *Holbrook &c. Co.*, 102 N. Y. App. Div. 49, 52.

Knight v. *Lee*, 1 Q. B. 41 (1895), is to the same effect.

In *Burbank* v. *Inhabitants of Auburn*, 31 Me. 590, a statute providing that "no action shall hereafter be maintained against any city," &c., was held inapplicable to pending cases, the word "maintained" being considered to have the import of *brought*.

A similar decision was made in *Smith* v. *Lyon*, 44 Conn. 175, 178, in which the court said:

> "Nor are we willing to overthrow a rule so firmly founded in justice upon the plaintiff's suggestion as to the word 'maintained'; for we do not think that, as used in the act, it in itself imports retroactive intent on the part of the legislature. A critical analysis of it would doubtless disclose the idea of continuing a life already commenced; *but men both in and out of the profession often speak of maintaining an action, having reference to one yet to be instituted.*"

So, too, in *Creditors' Adjustment Co.* v. *Rossi*, 20 Cal. App. 725, a prohibition against the maintenance of an action was held not to apply to cases brought before the enactment of the prohibition. The court said:

> "The word 'maintain' as here used means to commence, institute, begin, or bring."

In addition, U. S. Rev. Stat. Sec. 13 (U. S. Code, Title 1, Sec. 29), is in the nature of a saving clause, if one be needed, preventing the application of the amendment to pending cases. That section is not confined to penal statutes.

Hertz v. *Woodman*, 218 U. S. 205, 217, 218.

2. If the amendment were held applicable to pending cases, substantive rights, and not mere procedure, would be affected, particularly in cases where reliance upon the right to maintain an injunction suit has prevented timely resort to the remedy of paying the tax under protest and suing to recover it back. Under such circumstances the rule against giving a statute retroactive operation applies with peculiar force.

U. S. Fidelity Co. v. *Struthers Wells Co.*, 209 U. S. 306.

3. Even if the amendment were applicable to cases pending *in the District Court*, it would not affect cases already determined in the District Court or affect the jurisdiction of this court to review decrees of the Circuit Court of Appeals.

The new statute does not amend Section 41 of the Organic Act, which prescribes the jurisdiction of the District Court (39 Stat. 965; U. S. Code, Tit. 48, § 863). It does not amend Section 128 of the Judicial Code (U. S. Code, Title 28, Sec. 225), giving the Circuit Court of Appeals appellate jurisdiction to review final decisions of the District Court for Porto Rico. Neither does it amend Section 240 of the Judicial Code (U. S. Code, Title 28, Sec. 347), giving this court jurisdiction to review decisions of the Circuit Court of Appeals. *The appellate jurisdiction thereby prescribed remains unchanged.*

While an appeal, unlike a writ of error, may not be technically the institution of a new suit, the perfecting of

the appeal transfers the case from the trial court to the appellate court (*Keeper* v. *Farr*, 105 U. S. 265; *Morris* v. *Lawler*, 91 Fed 653). Consequently, the prosecution of an appeal cannot be regarded as the maintenance of a suit in the trial court.

Neither appeals nor writs of error ordinarily are regarded as within the purview of statutes affecting "actions" or "suits."

3 *Corpus Juris*, pp. 305, 330.

4. If the amendment be construed as affecting cases already finally determined in the District Court and already taken to a higher court for review, a situation would be presented with respect to which the **decisions of different Circuit Courts of Appeal are in conflict**.

In 1898 the Tucker Act, giving the old Circuit Court concurrent jurisdiction over certain claims against the United States, was amended by providing that such jurisdiction should not extend to cases brought by officers of the United States to recover compensation for official services. Several of such cases already had proceeded to judgment in the old Circuit Court and were pending on writ of error. In the *Fifth* and *Ninth* Circuits it was held that in view of the amendment the writ of error should be dismissed, thus leaving the judgments in force.

United States v. *McCreary*, 91 Fed 295
United States v. *Kelly*, 97 Fed 400

In the *Second* Circuit it was held that jurisdiction to review still continued.

United States v. *Jacobus*, 96 Fed 280.

If, despite our contention to the contrary, it should be held that the amendment here involved is analogous to the

1898 amendment of the Tucker Act, this *conflict between different Circuit Courts of Appeal* as to the effect of such a statute will have to be resolved by this court.

The petition for writs of certiorari should be granted.

Respectfully submitted,

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